(2)

Supreme Court, U.S.
FILED
AUG 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2148

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT SARGENT HALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TPP

TABLE OF AUTHORITIES

Page

Cases:

Bowers v. *Hardwick*, No. 85-140 (June 30, 1986) 3

New York v. *Ferber*, 458 U.S. 747 ..... 4, 5

Stanley v. *Georgia*, 394 U.S. 557 ..... 3, 4, 5

United States v. *Orito*, 413 U.S. 139 ..... 3, 4

United States v. *Reidel*, 402 U.S. 351 3-4

United States v. *Thirty-Seven Photographs*, 402 U.S. 363 3

Constitution and statutes:

U.S. Const. Amend. I 3, 5

Pub. L. 98-292, § 2, 98 Stat. 204 4

18 U.S.C. 545 1

18 U.S.C. 552 4

18 U.S.C. 1462 4

18 U.S.C. 1465 4

18 U.S.C. 2252 4

18 U.S.C. 2252(a)(2) 1, 4

19 U.S.C. 1305 2

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2148

ROBERT SARGENT HALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his constitutional right to privacy entitled him to receive obscene materials that were mailed to him from abroad.

1. Following a bench trial in the United States District Court for the Southern District of California, petitioner was convicted on five counts of importing obscene materials, in violation of 18 U.S.C. 545, and five counts of receiving material involving the sexual exploitation of a minor, in violation of 18 U.S.C. 2252(a)(2). He was sentenced to concurrent three-year periods of probation on each count and fined $500. The court of appeals affirmed on eight of the ten counts (Pet. App. A1-A13). In reversing his convictions on the remaining two counts, the court did not disturb petitioner's sentence (Pet. App. A13 n.4).

In May 1984, petitioner ordered two magazines and four sets of photographs from a distributor in the Netherlands. Later that month, Customs officials intercepted the first set of photographs and notified petitioner that the photographs were obscene and thus subject to seizure and forfeiture under authority of 19 U.S.C. 1305. Thereafter, Customs inspectors intercepted and seized four other envelopes arriving from the Netherlands, three of which contained the remaining sets of photographs and the last of which contained one of the magazines ordered by petitioner. Pet. App. Al-A4.

Rather than notify petitioner of these seizures, however, Customs officials sought a search warrant for petitioner's home. In support of their request for the warrant, the officials recounted in an affidavit the interception and seizure of the four parcels and provided copies of the seized materials to the magistrate. In addition, the officials explained that if the warrant were issued, they would "have the previously described envelopes delivered as addressed [to petitioner] by an employee of the United States Postal Service" before conducting a search of his residence. Pet. App. A4.

On June 22, 1984, the magistrate issued a warrant authorizing a search of petitioner's home for, inter alia, the three sets of photographs and the magazine described in the affidavit. Three days later, a postal carrier delivered four envelopes to petitioner containing the three sets of photographs and the magazine. Soon thereafter, Customs officials executed the search warrant and seized the four envelopes as well as 45 other books and magazines.[1] Pet. App. A4-A5.

---

[1]The three sets of photographs and the magazine particularly described in the search warrant formed the basis for eight of the ten counts against petitioner. A second magazine seized during the search formed the basis for the remaining two counts. The court of appeals subsequently concluded that the search warrant did not describe the second magazine with sufficient particularity, and it therefore reversed petitioner's convictions on those two counts (see Pet. App. A7-A10).

2. Petitioner asserts (Pet. 4-7) that the decision of the court of appeals, which upheld his convictions for receiving obscene materials, conflicts with this Court's holding in *Stanley* v. *Georgia*, 394 U.S. 557 (1969). The court of appeals, however, properly concluded that *Stanley* protects no more than "the private *possession* of books, films, and other forms of expression" and does not immunize the receipt of such materials through the mails (Pet. App. A12 (emphasis added)).

In *Stanley* v. *Georgia*, this Court reversed a conviction for the knowing possession of obscene materials, holding "that the mere private possession of obscene matter cannot constitutionally be made a crime" (394 U.S. at 559). The basis for the Court's holding, however, lay in *Stanley's* First Amendment right to privacy—his "right to satisfy his intellectual and emotional needs in the privacy of his own home" (*id.* at 565). See *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971) (plurality opinion) ("*Stanley's* emphasis was on the freedom of thought and mind in the privacy of the home."). Nothing in *Stanley* accorded obscene materials themselves any independent protection under the First Amendment. See, *e.g.*, *United States* v. *Orito*, 413 U.S. 139, 143 (1973). It therefore follows, as decisions of this Court subsequent to *Stanley* have made clear, that nothing in that decision limits the authority of Congress to regulate the distribution, transportation, or receipt of obscene materials. *United States* v. *Thirty-Seven Photographs*, 402 U.S. at 375-376; *United States* v. *Reidel*, 402 U.S. 351, 354-356 (1971). Cf. *Bowers* v. *Hardwick*, No. 85-140 (June 30, 1986), slip op. 8.

While Congress cannot constitutionally regulate the mere possession of obscene matter in the privacy of one's home, it can "declare it contraband and prohibit its importation," *United States* v. *Thirty-Seven Photographs*, 402 U.S. at 377, as well as its receipt through the mails, *United*

States v. *Reidel*, 402 U.S. at 354-356, without trenching upon legitimate privacy rights. Thus, it is settled that the right to possess obscene materials in the home does not confer upon the possessor the right to order the materials from abroad and cause their importation through the mails. See *United States* v. *Orito*, 413 U.S. at 143 ("we cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because * * * the material is intended for the private use of the transporter").[2]

3. Petitioner's reliance on *Stanley* is unavailing with regard to his convictions on the Section 2252 counts for an additional reason. Section 2252 punishes the receipt of materials involving the sexual exploitation of children. The purpose of the statute is not to regulate obscenity, as in the case of statutes dealing with the importation, transportation, and distribution of obscene materials (see 18 U.S.C. 552, 1462, 1465). Rather, the purpose of the child pornography statute is to combat the sexual exploitation and abuse of children. See Pub. L. No. 98-292, § 2, 98 Stat. 204 (congressional findings). As this Court has noted recently, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York* v. *Ferber*, 458 U.S. 747, 757 (1982). As the Court further noted, prevention of this form of child abuse requires more than "pursuing only those who produce the photographs and movies" (*id.* at 760). The compelling governmental interest in protecting children "afford[s] the State the leeway to regulate pornographic

---

[2]Contrary to petitioner's suggestion (Pet. 5-6), this is not a case in which petitioner simply "received" the obscene materials; the evidence showed that he ordered them from overseas and therefore caused their importation through the mails. The fact that he did not personally carry the materials into this country cannot make a difference for constitutional purposes.

material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material" *id.* at 776 (Brennan, J., concurring)). Because the balance of the competing interests in the case of child pornography weighs so heavily in favor of the state, we submit that governmental regulation could reach even private possession of child pornography in the home without violating the First Amendment. See *Stanley* v. *Georgia*, 394 U.S. at 568 n.11. *A fortiori*, there is no constitutional bar to proscribing the receipt of such materials that have been transported in interstate or foreign commerce.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1986